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ABSTRACT

A proposed model for the process of placement of exceptional (handicapped and gifted) children is described in terms of historical, ethical, procedural, and legal aspects. It is noted that historically IQ scores served as the main placement criterion. Stressed in the proposed model is the right of all children to an appropriate education and the right of due process for all involved persons. Described are the roles of screening, evaluation, assessment, placement, and followup in the process model. Reviewed are results of court cases (such as Mills v. Board of Education of the District of Columbia) and due process requirements of Public Law 93-380. Outlined are the ethical and legal requirements of the due process procedure in terms of prior notice, the due process hearing, the hearing procedures, and the decision. (DB)

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LEGAL AND ETHICAL CONSIDERATIONS OF SCHOOL PLACEMENT FOR EXCEPTIONAL CHILDREN

By

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Legal and Ethical Considerations of

School Placement for Exceptional Children

While the basic thrust of the following material will be oriented toward placement of exceptional children in programs, it should be noted that the authors feel strongly that there are possibilities for wide generalizability of our ideas. This paper will contain both a proposed model for the process of placement and the incumbent ethical and procedural aspects followed by the significant litigation which whould support the proposed model from a legal aspect.

Though there is a historic tendency to restrict the understanding of "exceptional children " to mean only the handicapped end of the continuum, our focus is on all aspects of exceptionality. The definition as offered by English and English (1968, p. 191) should appropriately describe the focus:

> An inclusive term for children who deviate considerably from the average in physique, sensory acuity, intelligence, social conformity, emotional development, etc.

An Ethical Model

In order to provide the necessary perspective for the proposed model. it seems highly desirable to present an obviously stereotypic sketch of the historic model. Following that, the elements of a proposed model will be spelled out.

Historic Model

While it may not be appropriate in all instances, the following is nonetheless widely held. Until the mid 1960's, the schools operated in a very autonomous manner when it came to the placement process for exceptional children. It whould also be remembered that at this point in time attending school was considered a privilege.

Typically, a given student was red-flagged by someone in a school as being exceptional. No matter what evidence was presented, the principal usually requested that the school psychologist or psychometrist administer a WISC or a Binet in search of an I.Q. below the magic number of 80 or 85. With the "hard data" in hand a decision was reached by someone to place or not to place the student in an exceptional program (assuming that an appropriate program existed). Usually it was not until this point, if ever, that the parents of the student were informed of the change or lack of change in school program. Needless to say, this type of procedure has left many students labeled, stigmatized and locked out of broader options for educational pursuits.

Unfortunately, it wasn't until the late 1960's and 1970's that the courts began to hear litigation on the arbitrary and capricious nature of the above process. The ethical and legal considerations have led to the following proposed model.

Proposed Model

At each of the following stages there are two primary concerns. The first of these is the right (no longer a privilege) of all public school age children to an appropriate education. The second developes as an outgrowth of the first. That is, due process must be assured to all parties.

The process model we are proposing is composed of four primary aspects: screening, assessment, placement and followup. Each of these aspects is described in the following material.

Screening. The policy established at the local level should spell out that each member of a school faculty is a trained and viable component of the school screening committee. Obviously this implies the critical need for districts to provide inservice training of an ongoing nature regarding this vital element in the placement process.

Assuming each faculty member to be a trained observer of human behavior, it should follow that each would be aware of the need for documentation of specifics which would lead to the referral for consideration at the next step in the process.

Evaluation of screening referral. Once the referral has been received by whomever is designated as the appropriate person for this position (Usually an administrator, counselor or school psychologist who will hereafter be termed the referral monitor), the school level placement team is convened and, from as many perspectives as possible, considers the viability of the referral data. In addition to assuring that due process has been observed, it becomes the responsibility of the team to recommend the most desirable assessment procedure (both test and non test aspects) to the referral monitor, or to find that the referral lacks sufficient validity and basis to proceed.

Assessment. The first step in the assessment process is for the referral monitor to involve the parent(s) in the decision making process. Contact must be made with the parent(s) before proceeding further. The explicit intent of this person to person contact must be to obtain informed consent to proceed. While Rodriguez and Lombardi (1973) found only 8 states which required parental permission to place students in special classes, recent federal legislation

(93-380) and court litigation would strongly suggest that acting without parental permission would likely be viewed as arbitrary and capricious and is obviously not within the ethical intent of due process and rights of parents.

The parent(s) must have the screening data presented and interpreted to them. Also, the next step(s) in the assessment aspect of the placement process should be openly discussed with them. It should be made clear at this time what the likely options are for the child in terms of the least restrictive program placement.[a] Having obtained the informed consent of the parent(s), the assessment aspect may continue. Without consent, the lengthy appeal process must begin which may mean the child stays in current placement in a special educational environment or may possible be excluded from school.

Assessment may or may not require additional testing, as this is but one portion of the process of assessment. Depending on the nature of the individual case, assessment could include any number of specific acts aimed at gaining a better understanding of the student's psychosocial (Erickson, 1968) or psychosituational (Grieger and Abidin, 1975) condition.

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[a]Least Restrictive Program - This is commonly referred in educational terms as mainstreaming. The new federal legislation P.L. 93-380, Title VI-B requires states to adopt:

> procedures to insure that to the maximum extent appropriate, handicapped children, including in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular education environment occurs only when the nature or severity of the handicapped is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Where testing is utilized, it is of the utmost importance that it be accomplished in a nondiscriminatory manner. Considerable care needs to be taken in the selection and administration of instruments as well as the interpretation of outcomes. Such concerns would obviously center around the standardization sample and norm group and concepts such as the reliability and validity of the instrument.

If the student is nonenglish speaking in terms of the primary language, then any testing must be condicted in both English and the student's primary language. No longer may a single test score form the total basis for placement of exceptional children. One of the primary tests of discriminatory testing is, do the results lead to an overrepresentation of minority groups in special groups? If they do, it is likely that a discrimination case could be successfully filed. (Griggs v. Duke Power Co.)

The results of the assessment (both test and nontest or "adaptive behavior") are returned to the assessment monitor. This person in turn again makes contact with the parents to present the findings and discuss the most desirable and least restrictive placement within a special program.

Pappanikou, et. al. (1974) have presented a five level approach to the program placement of the handicapped end of exceptional children. Few alternatives seem to exist outside of a gifted program for the other end. The obvious implication of this aspect is the need for expanded services for exceptional children and the need to train and employ or retrain existing personnel in this area. Before the least restrictive program concept can be widely applied, there must be functioning alternatives available.

Follow up. Assuming that the optimistic outcome of the preceeding mode has been positive for all concerned, there is the continuing need to reevaluate the placement to ensure that the student continues to be placed in the least restrictive program. The hope being that the student can with considerable

investment be reincorporated into the mainstream of the school community.

Legal Basis

The State-Federal Information Clearinghouse for Exceptional Children conducted a survey in 1974 to determine those states that had policies regarding due process rights of children before placing them in special programs. The survey revealed that 12 states were required by statute to provide due process to exceptional children before changing their educational placement while 13 states had regulations mandating due process, the remaining states had no policies. In recent years there has been a move on the part of the courts to mandate procedural safe guards before placing a child in a special program or excluding them from the educational process altogether. This had been an outgrowth of the concept, as previously mentioned, that education is a right and not a privilege. This was expressed in the famous Brown v. Board of Education of Topeka when the court said:

> Today education is perhaps the most important function of state and local government . . . . Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment.

Since this landmark decision the courts have determined that students have constitutional rights as they related to public education, other leading cases in this area are Dixon v. Alabama, Tinker v. Des Moines, Wood v. Strickland and Gross v. Lopez.

It has been well established that a child must be afforded due process if he/she is expelled from school and more recently in Goss it was determined that a child must be given due process even if suspended for a short period (10 days or less). The concept of due process has been recognized and expanded with regards to exceptional children in the areas of exclusion from school and placement in special educational programs. Two leading court decisions in this

area were Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania (1972-PARC) and Mills v. Board of Education of the District of Columbia (1972). The PARC case challenged the right of the commonwealth to exclude exceptional children from public education. A consent agreement was reached between the parties where no child could be excluded from the educational process and no child who was mentally retarded or thought to be mentally retarded could be assigned special educational status without due process. The agreement to provide a due process hearing stipulated the parent's right to counsel, to examine their children's records, compel attendance of school officials who might have evidence or knowledge of the situation, to cross-examine witnesses and to introduce their own evidence. The Mills case involved the exclusion of regular and exceptional students from regular school programs. This exclusion took the form of suspending, expelling, reassigning and transferring of "exceptional children" from regular school classes. The court said:

> That no child eligible for a publicly supported education in the District of Columbia public schools shall be excluded from a regular public school assignment by a rule, policy, or practice of the Board of Education of the District of Columbia or its agents unless such child is provided (a) adequate alternative educational services suited to the child's needs, which may include special education or tuition grants, and (b) a constitutionally adequate prior hearing and periodic review of their status, progress and the adequacy of any educational alternatives. (emphasis added)

Therefore, the case law supports that "exceptional" children must be afforded due process before they are placed in special classes. As previously mentioned, this paper relates to the exceptional child whether that child appears at one end of the learning spectrum or the other. It should be noted that most litigation and legislation relating to the exceptional child has focused on those children classified as physically or mentally handicapped.

The Congress of the United States recognized the legal needs of special education children when it passed Public Law 93-380. Sections of this federal legislation require that states must design and implement state plans which contain guidelines for due process in order to remain eligible to receive federal funds.

The act requires that the state provide:

> procedures for insuring that handicapped children and their parents or guardians are guaranteed procedural safeguards in decision regarding indentification, evaluation and educational placement.

These procedural safeguards include notice to the parents or guardians of the anticipated change in educational placement, an opportunity for an impartial hearing, the right to examine all relevant records of the child, the opportunity to an independent educational evaluation of the child and that the decision rendered at the due process hearing be binding on all parties. It would appear that all states will in the near future be developing legal procedures to insure the rights of exceptional children.

A specific model that includes the federal requirements and affords the exceptional child due process is presented below with the main elements consisting of: 1)Prior Notice; 2) Due Process Hearing; 3) The Hearing Procedures; and 4) The decision. It is recognized that a state or school district may expand or limit some of the areas suggested below. The proposed legal model for due process is integrated with the four primary aspects of the process model of: screening, assessment, placement and followup.

Model

1. Prior Notice:

   A. Notify the parents or guardian in writing, via certified mail return receipt requested, of the proposed change in educational placement. This should be done at least 10 days, preferrably

longer, prior to the action.

B. The written notice should contain:

1. Why such action is deemed appropriate;

2. What tests or reports the proposed action is based upon;

3. Inform the parents or guardian that relevant school records of the child are available for examination;

4. Explain any alternatives that may be available;

5. List the names and addresses of independent agencies that the parents might contact for evaluation; also, a list of the cost for such services or other public agencies that provide free evaluation;

6. Explain the procedure to be used and that the child has a right to a due process hearing;

7. The parents should be notified that they have the right to legal counsel at their own expense;

8. Explain that the child will remain in the present program until such a time as a due process hearing has been conducted, but explain if the health and safety of the other children are involved then the school will remove the child so as not to endanger the child or other children.

II. Due Process Hearing - After the written notification, provided that the placement cannot be settled in conference, the parents or guardians have a right to formal due process hearing.

A. The parents or guardian will request a formal hearing in writing.

B. The hearing will be scheduled within reasonable limits so as to provide the parents or guardian ample opportunity to prepare properly. As mentioned previously the parents should be informed before the hearing that:

1. The child will remain in the regular program until after the hearing unless the safety of others are involved;

2. The parents may present outside independent evaluations of the child's needs;

3. The parents have access to all relevant documents maintained by the school;

4. The parents may call for school officials who may have evidence relevant to the situation to appear at the hearing;

5. A tape recording or record will be kept of the proceedings;

6. The parents would have the right to have counsel.

III. The Hearing - Procedures

A. The school board or its impartial designee will preside at the hearing. The hearing officer will provide all parties with ample opportunity to present evidence.

B. The parents may have counsel, professional persons, or other representatives at the hearing.

C. Both parties may present evidence and testimony.

D. Both may question all witnesses.

E. The hearing shall be closed unless the parents request an open meeting.

F. The burden of proof as to the placement will be upon the school personnel.

G. The proceeding will be recorded.

H. Any unique needs of the parents or child, such as deafness, does not speak English, etc., will be considered and remedied by the hearing officer to provide a fair opportunity.

I. The child may attend if he/she has reached the age of majority. If the child is a minor and the testimony might be damaging to the child in the opinion of school officials, then the child may be excluded from the hearing.

IV. Decision - The decision shall be in writing and include findings of fact, conclusions and reasons for these findings and conclusions.

A public school system should be cognizant of the needs of exceptional children and act in an appropriate educational and legal manner.

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